

Message Text

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PAGE 01 STATE 215898
ORIGIN OPIC-06

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INR-10 NSAE-00 L-03 SP-02 TRSE-00 /045 R

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TO AMEMBASSY LOME PRIORITY

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E.O. 11652: N/A

TAGS: EINV

SUBJECT: TAW

REF: (A) LOME 2640 (B) STATE 202924

1) FOR THE RECORD OPIC WOULD EMPHATICALLY DISAGREE WITH
GOT ASSERTION, AS EXPLAINED REF A, THAT USG NEEDS GOT PER-
MISSION TO RECEIVE FUNDS IN NON-RESIDENT ACCOUNT FROM AN
OPIC-INSURED INVESTOR'S RESIDENT ACCOUNT UNLESS THERE HAD
BEEN PREVIOUS TRANSFER OF LARGER AMOUNT FROM THE NON-RES TO
THE RES ACCOUNT.

THIS SCENARIO INCONSISTENT WITH PROVISIONS OF USG/GOT BI-
LATERAL (IAG), WHICH (A) GIVES USG UNCONDITIONAL RIGHT
TO RECEIVE LOCAL CURRENCY PAID OVER IN RESPECT OF INSURED
INVESTMENT, (B) NOWHERE MENTIONS OR SUGGESTS ANY GOT
PERMISSION AS PRECONDITION TO SUCH RECEIPT, AND (C) NO-
WHERE CONDITIONS SUCH RIGHT OF RECEIPT ON PRIOR PAYMENTS
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PAGE 02 STATE 215898

FROM NON-RES TO RES.

THIS SCENARIO IS ALSO ILLOGICAL SINCE IN THE USUAL INVEST-
MENT INSURANCE SITUATION THERE IS NO PAYMENT WHATSOEVER
FROM THE USG NON-RES ACCT TO THE INVESTOR'S RES ACCT, MUCH

LESS A "LARGER" PRIOR PAYMENT.

IN OPIC VIEW, THEN, ANY "SPECIFIC LIMITATIONS" ON OPERATION OF NON-RES ACCT ARE SUPERCEDED VIS A VIS USG BY BILATERAL. INDEED, SUCH SUPERCESSION IS VERY RAISON D'ETRE FOR BILATERAL.

2) IT IS TRUE, OF COURSE, THAT IN USUAL INVESTMENT INSURANCE SITUATION, WHILE USG NON-RES ACCT DOESN'T PAY THE RESIDENT ACCOUNT MAINTAINED IN THE HOST COUNTRY BY THE FOREIGN ENTERPRISE IN WHICH THE INSURED INVESTOR HAS AN INTEREST, OPIC MAY PAY THE INVESTOR DOLLARS IN THE U.S. HOWEVER, (A) THIS IS NOT A NON-RES-TO-RES TRANSACTION BUT A NON-RES-TO-NON-RES; (B) IT HAPPENS AFTER THE HOST COUNTRY TRANSFER, NOT BEFORE; (C) THERE'S NO GUARANTY THAT THE DOLLAR TRANSFER IS LARGER THAN THE LOCAL CURRENCY TRANSFER. IT SHOULD ALSO BE NOTED THAT IN TAW CASE, OPIC, IN FORM OF SIX MILLION DOLLAR PAYMENT ON INVESTMENT GUARANTY, DID MAKE A PRIOR "IN US" DOLLAR PAYMENT OF TYPE DESCRIBED ABOVE AND IT IS IN RESPECT OF THIS PAYMENT THAT TAW WAS TRANSFERRING FRANCS TO USG.

3) THE FOREGOING INTENDED AS BACKGROUND. FOR PURPOSES OF CURRENT DIPNOTE DISCUSSIONS WITH GOT, OPIC BELIEVES IT INADVISABLE TO ELEVATE USG/GOT DIFFERENCE IN INTERPRETATION OF BILATERAL TO MAJOR POINT AT ISSUE.

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PAGE 03 STATE 215898

RATHER, OPIC WOULD SUGGEST THAT POST SEEK DIPNOTE AS OUTLINED REF B BUT ASSURE GOT USG IS AMENABLE TO FURTHER DISCUSSIONS TO CLARIFY RELATIVE FORCE OF BILATERAL VERSUS DOMESTIC BANKING REGS AND OBLIGATION OF USG TO SEEK APPROVAL FOR FUTURE TRANSFERS (IF ANY). PARENTHETICALLY, IN OPINION OF OPIC LEGAL, IT IS CLEAR UNDER APPLICABLE PRINCIPALS OF INTERNATIONAL LAW THAT BILATERAL, AS VALIDLY ISSUED INTERNATIONAL AGREEMENT OF GOT, FULLY SUPERCEDES ANY CONFLICTING LOCAL REGS.

4) FOREGOING COURSE OF ACTION RECOMMENDED SINCE GOT INSISTENCE ON INCLUSION OF REFERENCE TO USG APPROVAL PROCUREMENT RESPONSIBILITY POSES SIGNIFICANT PROBLEMS BOTH RE BILATERAL POLICY IN GENERAL AND TAW CASE IN PARTICULAR. AS OUTLINED ABOVE, SUCH REQUIREMENT INCONSISTENT WITH BASIC PURPOSE OF BILATERAL AND HENCE UNATTRACTIVE FROM POLICY VIEW-POINT? RE TAW SPECIFICALLY, INCLUSION OF SUCH STATEMENT WOULD SERIOUSLY UNDERMINE OPIC CONTENTION (AGREED WITH BY SUPREME COURT OF STATE OF NEW YORK ON BASIS OF COPIES OF BILATERALS AND TOGO, IVORY COAST, CAMEROON ETC. FOREIGN EXCHANGE REGULATIONS

SUPPLIED BY OPIC ATTORNEYS) THAT RESPONSIBILITY FOR PROCUREMENT OF TRANSFER APPROVALS LAY WITH TRANSFEROR (TAW) NOT WITH TRANSFEREE (USG). IF GOT INSISTS ON INCLUDING IN DIPNOTE REFERENCE TO USG OBLIGATION TO OBTAIN PRIOR RECEIPT APPROVALS DESPITE BILATERAL, WOULD APPRECIATE POST'S CONSULTING WITH OPIC BEFORE AGREEING TO FINAL DIPNOTE LANGUAGE.

5) OPIC APPRECIATES POST'S CONTINUED HARD WORK ON THIS MATTER. CHRISTOPHER

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